Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-6225-99
RLPeacock

date:

to: Chief, Examination Division
Attn: Revenue Agent Sid Baum

from: District Counsel, Manhattan

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subject: [redacted]
Taxable years [redacted], [redacted], [redacted] and [redacted]
Consent to Extend the Statute of Limitations on Assessment
STATUTE OF LIMITATIONS EXPIRES [redacted]

UIL Nos. 6501.08-00
6501.08-10
6501.08-12
6501.08-17
6901.03-01

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INTRODUCTION

This memorandum is in response to your request for advice in the above-captioned matter. Specifically, you have asked our office to review Forms 872 (Consent to Extend the Time to Assess Income Taxes) executed on behalf of [redacted], and its subsidiaries for the taxable years ending June 30, [redacted], June 30, [redacted], June 30, [redacted] and June 12, [redacted]. The advice given below is subject to post review by the Chief Counsel's national office.

Therefore, we ask that you wait ten working days from the date of this memorandum, or until you earlier hear of approval, before acting on this advice.

ISSUES:

1. Which entity is the proper entity to execute Forms 872 for [redacted], and its subsidiaries, for the pre-merger tax years?

2. What specific language should be used on the Forms 872 for [redacted], and its subsidiaries, for the pre-merger tax years?

3. Which individuals have authority to sign the Forms 872 for [redacted], and its subsidiaries, for the pre-merger tax years?

4. Whether prior Forms 872 executed by representatives of [redacted] with respect to the pre-merger tax years of [redacted], and its subsidiaries, but after the effective date of the merger, are valid.

5. Whether [redacted] is liable as the transferee of [redacted], and its subsidiaries, with respect to [redacted]'s income tax liabilities for the pre-merger tax years.

FACTS:

For the taxable years ending June 30, [redacted], June 30, [redacted], June 30, [redacted] and June 12, [redacted] ("pre-merger tax years"), [redacted] (E.I.N. [redacted]) ("[redacted]"), a New York corporation, was the common parent of an affiliated group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates. The Manhattan District is presently conducting an examination of [redacted] and its subsidiaries for the pre-merger tax years.

Effective [redacted], [redacted] merged with [redacted] (E.I.N. [redacted]) ("[redacted]"), a Delaware corporation, pursuant to the laws of the state of Delaware. [redacted] is currently included in the consolidated income tax returns of [redacted] (E.I.N. [redacted]) ("[redacted]").

The Agreement of Merger ("Agreement") between [redacted] and [redacted], dated [redacted], provides, in pertinent part:

1. [redacted] hereby merges into itself [redacted], and said [redacted] shall be and hereby is merged into [redacted] which shall be the surviving corporation;

2. Each share of common stock of the surviving corporation, which shall be issued and outstanding on the effective date of this Agreement shall remain issued and outstanding; and each share of common stock of the merged corporation which shall be issued and outstanding on the effective date of this merger and all right and respect thereof shall be cancelled immediately on the effective date of the merger, and the certificates representing such shares shall be surrendered and cancelled;

3. Upon the merger becoming effective, all liabilities and obligations of the merging corporation shall become the liabilities and obligations of the surviving corporation.

Agreement of Merger, ¶¶ First, Third (a)-(b), and Fourth (e).

"[redacted]" executed the following Forms 872:

Taxable Year	Date executed by [redacted]	Person who Executed	Date executed by District Director	Extension Date
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted] was a Vice President and Treasurer of [redacted]. [redacted] was an assistant treasurer of [redacted]. [redacted] is an assistant treasurer of [redacted].

By a letter dated [redacted], [redacted] notified the Manhattan District of the merger between [redacted] and [redacted]. In this letter, [redacted] informed the Manhattan District that she was authorized to sign Forms 872 as the assistant treasurer for both [redacted] and [redacted]. By a letter dated [redacted], [redacted] notified the Manhattan District of the current officers eligible to sign Forms 872 on behalf of [redacted], including [redacted].

Our office previously rendered advice, on [redacted], on the proper entity to execute Forms 872 on behalf of [redacted] for the taxable years ending June 30, [redacted] through June 30, [redacted], prior to [redacted]'s merger with [redacted]. We must now determine whether the remaining Forms 872 are valid.

DISCUSSION:

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 become separated from the file or lost, these other documents would become invaluable to establish the agreement.

Issue 1:

The first issue is which entity is the proper entity to execute Forms 872 for [redacted], and its subsidiaries, for the pre-merger tax years.

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on

assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent.

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment for income tax can be found in the consolidated return regulations. Treas. Regs. §1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. §1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having been given or executed by each such subsidiary. Treas. Reg. §1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. §1.1502-77(c).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. §1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for income tax for any taxable year for which it was the common parent, as long as it remains in existence.

In the instant case, for the pre-merger tax years ending [redacted], and [redacted], the Forms 872 executed prior to [redacted], are valid, as they were executed by [redacted], prior to the effective date of the merger.

A different analysis is required for the Forms 872 executed after the merger (on [redacted], [redacted] and [redacted]) between [redacted] and [redacted], as [redacted] ceased to exist after [redacted]. When a common parent ceases to exist, Treas. Reg. §1.1502-77(d) provides three rules for determining which corporation has authority to act in matters relating to the tax liability of the members of the group: (1) an entity designated by the old common parent can act as agent for the members of the group; or (2) if the old common parent fails to make such a designation, the surviving members of the

old group can designate an agent; or (3) if neither the old parent nor the surviving members make such a designation, the district director may deal with the old group members on an individual basis.

In the present case, the agent received letters dated June 17, 1997, and October 1, 1999, which designated the appropriate tax signatories. These letters designate signing authority to particular individuals, rather than to a particular entity. Based upon the information provided no designation of agent within the scope of Treas. Reg. §1.1502-77(d) has been made. Accordingly, the Manhattan District Director may deal with the old group members on an individual basis. This may not be administratively practical, however, given the number of affiliated subsidiaries of [redacted] for the years at issue. Fortunately, the regulations provide for additional alternatives.

Temp. Treas. Reg. §1.1502-77T provides alternative agents for the purpose of extending the statute when the common parent of a group ceases to be a common parent. Under this provision, a waiver obtained from any one of several alternative agents is deemed to be given by the agent of the group. Temp. Treas. Reg. §1.1502-77T(a)(3). The alternative agents listed are as follows:

> (i) The common parent of the group for all or any part of the year to which the notice or waiver applies;
>
> (ii) A successor to the former common parent in a transaction to which section 381(a) applies;
>
> (iii) The agent designated by the group under Treas. Reg. §1.1502-77(d);
>
> (iv) If the group remains in existence after a reverse acquisition or downstream transfer, the common parent of the group at the time the waiver is given or the notice mailed. Temp. Treas. Reg. §1.1502-77T(a)(4).

In the subject case, subparagraph (a)(4)(i) does not apply because [redacted] is no longer in existence. Likewise, subparagraph (a)(4)(iii) does not apply because no agent appears to have been designated by the group. Based on the facts provided to our office, subparagraph (a)(4)(iv) does not apply, as there appears to be neither a downstream transfer nor a reverse acquisition within the meaning of Treas. Reg. §1.1502-75(d)(3). Nevertheless, we believe that subparagraph (a)(4)(ii) applies.

Section 381 applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F) or (G) of section 368(a)(1). Therefore, if the subject merger is a tax-free reorganization within the meaning of sections 361 and 368(a)(1), then section 381 will apply to the merger. If section 381 applies, [redacted] would be an alternative agent for [redacted] pursuant to Temp. Treas. Reg. §1.1502-77T(a)(4)(ii) for the taxable years in question.

To qualify as a tax-free reorganization under section 368(a)(1), the following requirements must be met: First, the transaction must be structured as a Type A, C, D, F, or G reorganization. I.R.C. §368(a)(1). Second, there must be continuity of proprietary interest. Treas. Reg. §1.368-(1)(b). Third, the restructuring must have been pursuant to a plan of reorganization. I.R.C. §§354 and 361. Fourth, there must be a business purpose for the reorganization. Treas. Reg. §1.368-1(c). Finally, there must be continuity of business enterprise. Treas. Reg. §1.368-1(d).

In the subject case, it appears that the above requirements have been met. First, the merger is a Type A reorganization because it is the merger of [redacted] into [redacted], with [redacted] as the surviving corporation, pursuant to the corporation laws of the State of Delaware. See Treas. Reg. § 1.368-2(b)(1). Second, there is the continuity of proprietary interest, since the holders of stock of [redacted] retained their stock in the surviving corporation. Third, the restructuring was pursuant to a plan of reorganization as evidenced by the Merger Agreement. Fourth, the business purpose of the reorganization is evident because there appears to be no purpose for the merger, other than a business purpose. Finally, there is continuity of business enterprise since there has been no indication that the reorganized corporation will not continue [redacted]'s previous business activities. See 12 U.S.C. §214b.

In view of the foregoing, the merger appears to be a reorganization within the meaning of section 368(a)(1)(A). Therefore, [redacted] would be the successor to [redacted] in a transaction to which section 381 applies. [redacted] would then be an alternative agent for purposes of entering into an agreement to extend the statute of limitations on assessment for the [redacted] consolidated group for the tax years at issue pursuant to Temp. Treas. Reg. §1.1502-77T(a)(4)(ii).

Issue 2:

The second issue is what specific language should be used on the Forms 872 for [redacted], and its subsidiaries, for the pre-merger tax years.

As a result of [redacted]'s merger with [redacted], [redacted] ceased to exist effective [redacted]. Accordingly, [redacted] is the proper entity to sign the Forms 872 executed after [redacted], in a dual capacity: as an alternative agent for [redacted] under Temp. Treas. Reg. §1.1502-77T and as a successor in interest, by way of merger, with [redacted]. The name of the taxpayer appearing on the Forms 872 should be as follows:

"[redacted] (E.I.N. [redacted]), as alternative agent for [redacted] (E.I.N. [redacted]), and [redacted] consolidated group, pursuant to Temp. Treas. Reg. § 1.1502-77T, and as successor in interest by way of merger with [redacted] (E.I.N. [redacted])*"

In addition, at the bottom of the page, the following language should be added:

"*This is with respect to the consolidated tax liability of [redacted] (E.I.N. [redacted]) [redacted] consolidated group for the taxable years ending June 30, [redacted], June 30, [redacted], June 30, [redacted] and June 12, [redacted]."

The E.I.N. of [redacted] (E.I.N. [redacted]) should be entered in the upper right hand corner of the Forms 872.

Issue 3:

As set forth above, [redacted] is the proper entity to execute Forms 872 on behalf of [redacted] for the pre-merger tax years of [redacted] and its subsidiaries. Thus, the third issue is which representatives from [redacted] have authority to sign the Forms 872.

The regulations under section 6501(c)(4) do not specify who may sign consents to extend the statute of limitations. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution of a consent to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of a corporate return, section 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Since the rules applicable to the execution of an original return also apply to a consent to extend the statute of limitations, any such consent may be signed by the above-noted individuals. Rev. Rul. 84-165.

Here, the representatives of [redacted] authorized to execute Forms 872 are the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer authorized to act.

Issue 4:

The fourth issue is whether prior Forms 872 executed by representatives of [redacted] with respect to the pre-merger tax years of [redacted], after the effective date of the merger, are valid.

Prior extensions relating to [redacted]'s pre-merger tax years were executed subsequent to the effective date of the merger in the name of "[redacted], and its subsidiaries." The consents were, therefore, captioned and signed in the name of an entity that no longer existed. Arguably, the consents are invalid and the statute of limitations on the assessment of the income tax liabilities have already expired.

To be valid, a Form 872, need not be executed perfectly. The critical element is the signature of an officer of the surviving corporation, here [redacted]. The fact that an officer of such entity used the old name can be considered a clerical error, which should not affect the validity of the form. See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985)(waiver extending time to assess tax valid on its face since failure to include the name of the taxpayer-corporation with the signature of its president constituted a mere clerical error); see also Three G Trading Corp. v. Commissioner, T.C. Memo. 1988-131 (waiver extending time to assess tax valid on its face despite being executed by officer in his individual capacity rather than as a representative of the corporation).

Furthermore, although a consent extending the time to assess taxes is not a contract, contract principles are significant because section 6501(c)(4) requires that the parties reach a written agreement concerning any extension. The term "agreement" means a manifestation of mutual assent. Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983), acq., 1984-2 C.B. 2. It

is the objective manifestation of mutual assent as evidenced by the parties' conduct that determines whether they have made an agreement. Kronish v. Commissioner, 90 T.C. 684 (1988).

In the subject case, there has been a meeting of the minds between the parties. The agreement, however, does not express what was really intended by the parties - an extension of the statute of limitations on the income tax liability of [redacted] for the taxable years [redacted], [redacted], [redacted] and [redacted]. The situation can be characterized as a mutual mistake. Where a written agreement does not conform with the actual agreement of the parties, a court may reform the writing to conform to the parties' intentions. Reformation is an equitable remedy used to reframe written contracts to reflect the actual agreement between the parties when, because of mutual mistake, the writing does not embody the contract as actually made. Reformation is allowed whenever there is a mistake in drafting. See Woods v. Commissioner, 92 T.C. 776 (1989).

Here, the Forms 872 contain, at most, a clerical error which should be subject to reformation. The Forms 872 in question were executed by assistant treasurers of [redacted], in the name of [redacted]. We, therefore, believe that the Forms 872 for [redacted] for its pre-merger income tax liabilities effectively extended the statute of limitations on assessment through [redacted]. Moreover, should the validity of the consents be attacked, we believe that, as discussed above, the validity could be successfully defended.

With respect to the Forms 872 extending the statutes of limitation on assessment through September 30, [redacted], however, our office recommends that you timely obtain new Forms 872 from an authorized representative of [redacted] (as set forth above in issue 3), and incorporating the suggested language (as set forth above in issue 2), for the pre-merger tax liabilities of [redacted].

Issue 5:

The fifth issue is whether [redacted] is liable as the transferee of [redacted], with respect to [redacted]'s income tax liabilities for the pre-merger tax years.

Section 6901(a) provides a procedure by which the Service may collect taxes from a transferee of property that is liable at law or equity for the taxes of the transferor. To establish transferee liability in equity, the Service must generally prove: (1) the taxpayer transferred property to another person; (2) at the time of the transfer the taxpayer was liable for the tax; (3) the transfer was made after the liability for the tax had

accrued; (4) the transfer was made for less than full and adequate consideration; (5) the transferor was insolvent at the time of the transfer or was rendered insolvent by the transfer; and (6) the government has exhausted all reasonable efforts to collect the tax from the taxpayer. See Commissioner v. Stern, 357 U.S. 39 (1958).

In contrast, transferee liability at law may be established through (1) the assumption of liability contract theory or (2) the assumption of liability under state statute. See Turnbull, Inc. v. Commissioner, 373 F.2d 91 (5th Cir.), cert. denied, 389 U.S. 842 (1967). Under the assumption of liability contract theory, a surviving corporation in a merger that agrees to assume all the transferor's liabilities is liable as a transferee for deficiencies due from the transferor. Id. To establish transferee liability under state statute, the applicable state merger law must be examined.

As discussed above, the subject merger took place pursuant to Delaware corporate law. Under the law of Delaware, the corporation that survives a merger becomes liable for all the debts and liabilities of the respective constituent corporations. Del. Corp. Law § 259(a). Accordingly, when [redacted] and [redacted] merged and [redacted] emerged as the surviving corporation, [redacted] became primarily liable for [redacted]'s pre-merger debts and liabilities, including [redacted]'s pre-merger income and employment tax liabilities.

In addition, since [redacted] agreed to assume the debts and liabilities of [redacted] pursuant to the terms of the Merger Agreement, [redacted] is also liable for [redacted]'s pre-merger income and employment tax liabilities as a transferee. Section 6902(a) places the burden of proving transferee liability on the Service. Accordingly, [redacted] should execute Form 2045 (Transferee Agreement) acknowledging that it is transferee of [redacted] with respect to [redacted]'s pre-merger income tax liabilities. The form should be executed by [redacted]'s president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. I.R.C. § 6062. See Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Finally, I.R.C. § 6901(d) provides that the parties may extend the transferee liability statute by agreement. [redacted] should, therefore, also execute Form 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Liability Against a Transferee or Fiduciary) for [redacted]'s pre-merger income tax liabilities. Like the Form 2045, the Form 977 should be executed by any individuals

authorized to act on behalf of [redacted], in accordance with I.R.C. § 6062 and Rev. Rul. 84-165.

If you have any questions, please contact Robin L. Peacock or the undersigned at (212)264-1595.

LINDA R. DETTERY
District Counsel

By: _____
PETER J. LABELLE
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Noted:

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